FILED
FEB 12 1942
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 844

BAKERY SALES DRIVERS LOCAL UNION NO. 344 (A. F. OF L.), AUTO TRUCK DRIVERS JOINT COUNCIL NO. 50 (A. F. OF L.), ELMER JOHNSON, JOSEPH REICHARTZ, GILBERT SCHLECHTA AND G. McMICKEN,

Petitioners,

vs.

CARPENTER BAKING COMPANY, A CORPORATION.

Respondent.

REPLY BRIEF.

JOSEPH A. PADWAY AND
A. G. GOLDBERG,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 844

BAKERY SALES DRIVERS LOCAL UNION NO. 344 (A. F. OF L.), AUTO TRUCK DRIVERS JOINT COUNCIL NO. 50 (A. F. OF L.), ELMER JOHNSON, JOSEPH REICHARTZ, GILBERT SCHLECHTA AND G. McMICKEN,

Petitioners,

vs.

CARPENTER BAKING COMPANY, A CORPORATION.

Respondent.

REPLY BRIEF.

The respondent has filed a brief opposing the issuance of a writ of certiorari in the above entitled matter basing its opposition to the granting of the writ on the following grounds: (1) The principal question has become moot; (2) the concerted activities of the petitioners were engaged in to achieve an unlawful object.

Because both of such arguments represent an effort to inject new and unwarranted issues into the case, petitioners have deemed it necessary to make brief reply thereto.

However, before discussing those issues we wish to comment on the argument found at pages 10 through 12 of re-

spondent's brief. It is there asserted that the action of the Wisconsin Legislature in passing the present Chapter 111, Stats. 1939, was induced by request of employers and *employees* alike, and as a result of a claimed abuse of privileges granted and protection afforded by other state laws. We do not wish to honor such palpably baseless argument by making extended answer thereto. We wish only to point out the circumstances under which some employees requested such legislation, as found by the National Labor Relations Board:

> "Shortly before the Catlin Bill was called up for committee hearing, the sales drivers were assembled by Sales Manager Pierce and told they were going to Madison. Pierce, two supervisors, and Winkel arranged transportation for all. Winkel, Hesselbach, and Francis Cantine, a sales driver, were requested by M. H. Carpenter to prepare speeches for delivery before the committee and each submitted a draft to Carpenter for correction before having it typed in the respondents' office. However, Cantine was the only sales driver who spoke. M. H. Carpenter addressed the committee and declared, among other things, that if the Catlin Bill was not passed 'he would spend the rest of his life defeating labor.'
>
> "At no time during the exercise of 'economic pressure' was the picketing by the A. F. of L. anything but peaceful and orderly. Carpenter's statements were clearly calculated to leave an erroneous impression of the aims of the A. F. of L. with his listeners. We conclude that the events participated in by the respondents in which they required the sales drivers to take part, were acts of interference, not only in the rights of the employees to self-organization, but also interference and domination in the administration of the Brotherhood.
>
> "The Catlin Act became the law of the State of Wisconsin on or about March 30, 1939. The plant re-

opened on April 4, 1939, free from the 'economic pressure' of the Union.'' [1]

So much then for the argument that this vicious one-sided labor legislation, designed to thwart the right of self-organization, resulted from the pleas of employees as well as employers to free them from "the tyranny of the multitude".

This legislation reflects rather the tyranny of the Legislature which, representing the group in power, imposes "penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests". (*Thornhill* v. *Alabama*, 310 U. S. 88; 60 Sup. Ct. 736.)

I.

No Issue in the Case Has Become Moot.

At the outset we observe the revealing fact that respondent did not seek to preclude an appeal by the State Supreme Court on the ground that the principal question was moot. The contract upon which it relies in support of its contention was executed on April 1, 1941. The Supreme Court of Wisconsin did not render its decision until June 25, 1941, almost three months after the contract was entered into. If the case be moot now, then obviously it was moot before the Supreme Court of Wisconsin decided the appeal. We think it fair to conclude that the respondent does not seriously believe that the case or any issue raised by it

[1] Excerpt from decision and order of the National Labor Relations Board, dated January 16, 1941, in Case No. C-1664 entitled "In the Matter of *Carpenter Baking Company*, a Corporation, *Michael Carpenter Company*, a Corporation, *M. Carpenter Baking Company*, a Corporation, *Joseph J. Carpenter*, individually, *Joseph M. Carpenter*, individually, and *M. H. Carpenter*, individually, and *Auto Truck Drivers Joint Council No. 50* (A. F. of L.)".

is moot. It is merely seeking, somewhat frantically, to seize on any beclouding issue that comes to mind, no matter how unfounded or how irrelevant, in order to deny petitioners an opportunity to have this Honorable Court protect their constitutional rights.

In any event, respondent's argument is completely without merit. It is entirely premised upon an assumption which is wholly at variance with the stipulation and with the conclusions of the court below. That assumption is that the controversy that resulted in the litigation and injunction was between the union and the employer over certain questions that were subsequently settled by the agreement of April 1, 1941. Nothing is further from the truth.

We have abundantly shown in our main brief in support of the petition for the writ (pp. 38-43) that the dispute was between employees or competing labor unions and not between petitioning union and the respondent. Petitioners have sought, and still seek, to have all of respondent's employees become members of the union. The dispute was and is between the union and those of respondent's employees who refuse to join the union. This is pointedly established by the fact that employees of the company who were not members of the union were not picketed (R. 27). The company was not picketed. The union picketed only those employees who failed or refused to become its members.

The contract of April, 1941, did not terminate that dispute. It could not. Under the Wisconsin Statutes a closed shop is unlawful unless seventy-five per cent of the employees desire the same. The union has still not succeeded in inducing seventy-five per cent, much less one hundred per cent, of the respondent's employees to become its members. Petitioners are as anxious today as they were before the injunction was issued in the court below to engage in lawful activities to induce all of re-

spondent's employees to join the union. (See Affidavit annexed hereto as Appendix "A".) The same controversy that preceded the injunction still persists and has not been terminated or even affected by the contract of April, 1941.

If the decree of the court below were set aside, and, as we contend, it should be set aside because it deprives petitioners of constitutional rights, then the same activities that petitioners formerly engaged in would be immediately resumed. It is clear, therefore, that the case is not moot and that a decision by this Honorable Court favorable to petitioners would not be a decision on an academic question but would result in desired and effectual relief to petitioners.

II.

There is no evidence which would support a finding that petitioners engaged in concerted activities to attain an unlawful objective, nor was there any such finding by the court below.

In petitioners' brief in support of the petition for certiorari, it is pointed out that the Circuit Court for Milwaukee County made express findings of fact with respect to the objectives of the union, all of which findings clearly demonstrate that the object of the union was to induce the sales drivers of the company to join Local 344 (Brief, pp. 41-43. R. 35-54). There is, therefore, no basis for respondent's argument at pages 17 through 28 of respondent's brief that the concerted activities of the employees was for the purpose of compelling the employer to violate any provision of law.

It can be seen from the stipulated facts that on only one occasion did petitioners demand that the respondent sign an all-union agreement (R. 36-37). This was in December, 1938, before the passage of Chapter 111, laws of 1939, and such agreement was valid under the then existing laws. (*United Shoe Workers, etc.* v. *Wisconsin Labor Relations*

Board, 227 Wis. 569, 279 N. W. 37; *American Furniture Co. v. I. B. of T. C. S. & H.,* 222 Wis. 338, 268 N. W. 250.)

At no time after that, and particularly at no time after the passage of Chapter 111 in May of 1939, did the petitioners make any request upon the company to sign an agreement prohibited by State law. The court below found expressly that all subsequent activities were for the purpose of persuading the non-union employees to join the union.

It is not the contention of the petitioners in the instant case that peaceful picketing is not subject to restraint regardless of the object which such activities are designed to achieve. It is not necessary to discuss that proposition of law in the instant case. There is nothing about the objectives sought by the union—unionization of the employees of the employer by direct appeal to the public, and by the public designation of the non-union status of such employees—which is forbidden by either State or national law or which could validly be forbidden. Petitioners do not seek in the instant case to compel the employer to violate any law. Rather do petitioners seek in the instant case to put themselves in a position which will permit the employer to sign an all-union agreement with it without violating any law. That is the sole object of the petitioners.

We hardly think it necessary to comment elaborately upon the suggestion that what is here involved is an effort by a State legislature to prevent coercion of employees by labor unions or others. The fact is, as conclusively found by the Circuit Court of Milwaukee County (R. 26-27), that petitioners engaged in peaceful, truthful and nonviolent picketing activities. This concrete conduct and not vague abstractions like "coercion" or "intimidation" has been enjoined. It is self-evident that constitutional freedoms and rights cannot be circumvented or vitiated by meaningless name-calling.

Certainly, if such distortion of the law is to be upheld then the statement in the *Senn* case, the *Thornhill* case, the *Carlson* case, the *Swing* case, and the *Meadowmoor* case, that picketing is merely an exercise of the right of free speech, the workingman's means of communication, means nothing at all.

Conclusion.

It becomes increasingly important that this Honorable Court render an opinion which will meet the new cry of "illegality of purpose" which has now been raised by employers in an effort to avoid the salutary principles announced in the *Thornhill, Carlson* and *Swing* cases. The instant case affords such opportunity. In the instant case, we have a holding of a state court that the resultant injury from peaceful picketing activities constitutes the standard for the purpose of determining the legality or illegality of the objectives as well as the legality or illegality of the means. It is a standard which has been recently rejected by this Court in the *Senn, Thornhill* and *Swing* cases in which it was pointed out that resultant damages from the exercise of the right of free speech for a legitimate purpose is *damnum absque injuria,* and does not constitute the measure for ascertaining the legality of purposed means.

It also becomes increasingly important that this Honorable Court make it clear to lower courts and to state legislatures that the device of applying opprobrious epithets, such as "coercion" and "intimidation", to the peaceful exercise of rights guaranteed by the Constitution must be abandoned, and the right to freedom of speech must remain inviolate.

Respectfully submitted,

JOSEPH A. PADWAY and
A. G. GOLDBERG,
Attorneys for Petitioners.